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9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 JASON FYK,

14 *Plaintiff,*

15 vs.

16 FACEBOOK, INC.,

17 *Defendant.*  
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Case No. 4:18-cv-05159 (HSG)

**UNITED STATES OF AMERICA'S  
ACKNOWLEDGMENT OF  
NOTICE OF CONSTITUTIONAL  
CHALLENGE**

FRCP 5.1 Notice Filed on ECF:  
September 19, 2023  
Hearing Date: none set

1 Plaintiff filed on September 19, 2023 a document that, albeit styled as a  
2 “motion,” the United States construes as a notice of constitutional challenge  
3 regarding 47 U.S.C. § 230(c) (Dkt. 66 (“Rule 5.1 Notice”)). The Court has not  
4 certified the constitutional question. *See* Fed. R. Civ. P. 5.1(b); 28 U.S.C. § 2403.  
5 The Rule 5.1 Notice did not attach any pending “pleading, written motion, or other  
6 paper . . . that raises” the constitutional challenge. *See* Fed. R. Civ. P. 5.1(a).

7 The Rule 5.1 Notice argues (at 8-9) that the District Court’s prior dismissal  
8 of the action should be “overturned.” Thus, the Rule 5.1 Notice apparently relates  
9 to Plaintiff’s second motion under Rule 60 for relief from the prior dismissal, Dkt.  
10 61, briefing on which appears to have closed on July 7, 2023, when Plaintiff replied,  
11 Dkt. 63.

12 In light of the pendency of Plaintiff’s second motion under Rule 60, and the  
13 apparent absence of any pending “pleading, written motion, or other paper . . . that  
14 raises” the constitutional challenge, the United States does not expect to make a  
15 further filing concerning the Rule 5.1 Notice.

16 Additionally, the United States notes that the approval of the Solicitor  
17 General would be required for the United States to intervene in response to a Rule  
18 5.1 notice. *See* 28 C.F.R. § 0.21. Ordinarily, the process of obtaining a decision from  
19 the Solicitor General regarding intervention takes at least several weeks, sometimes  
20 longer. As such, if the Court were to call for a decision by the United States whether  
21 to intervene in response to the Rule 5.1(a) Notice, the Department of Justice would  
22 be required to request an extension of time sufficient to obtain such a decision from  
23 the Solicitor General. That delay would be unnecessary if the Court were to decide  
24 Plaintiff’s second motion under Rule 60 based on the existing briefs, Dkt. 61-63.

25 The United States respectfully submits that, following disposition of  
26 Plaintiff’s second motion under Rule 60, if further proceedings resume in this Court,  
27 and if Plaintiff then asserts a constitutional challenge, this Court should order  
28 Plaintiff to file and serve a Rule 5.1 notice attaching the paper raising any such

1 challenge. Fed. R. Civ. P. 5.1(a)(2); *see also* Wright & Miller, 4B *Federal Practice*  
2 *and Procedure* § 1154 (4th ed. Apr. 2023 update).

3  
4 DATED: October 2, 2023

Respectfully submitted,

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7  
8 /s/ Indraneel Sur

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